

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )  
78425-s76H BY MARIO LOCATELLI     )     FINAL ORDER

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 30, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, a Permit is hereby granted for Application for Beneficial Water Use Permit 78425-s76H by Mario Locatelli to appropriate 12.00 gallons per minute up to .48 acre-feet of the waters of South Channel Roaring Lion Creek at a point in Lot 13 of Teal Young Orchard Tracts, more specifically, in the S½S½SW½SE½ of Section 2, Township 5 North, Range 21 West, Ravalli County, for irrigation of 0.14 acre of lawn and garden located in Lot 13 of Teal Young Orchard Tracts, in the S½S½SW½SE½ of said Section 2. The means of diversion shall be either a gravity flow two-inch pipeline and hose or a pump and hose. The period of use

**FILMED**

NOV 16 1992

**CASE # 78425**

and diversion shall be from May 15 through July 15, inclusive of each year.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. In order to assure the means of diversion and conveyance Applicant chooses are adequate, Applicant shall inform the Manager of the Missoula Water Resources Regional Office, of his choice of diversion and supply any specifications requested before installation of said diversion means and conveyance.


3. Granting of this Permit does not grant the Permittee the right to manipulate the bank of South Channel Roaring Lion Creek in any way to accomplish perfection of this Permit.

4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 19 day of September, 1992.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 28<sup>th</sup> day of September, 1992 as follows:

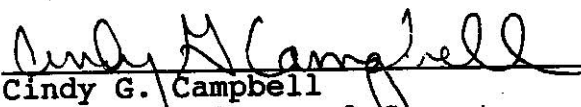
Mario Locatelli  
165 Mountain Goat Rd.  
Hamilton, MT 59840

The Lee Llama Co.  
77 Storm King Rd.  
Hamilton, MT 59840

John D. Greef  
Attorney at Law  
P.O. Box 1434  
Hamilton, MT 59840

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

  
\_\_\_\_\_  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR BENEFICIAL WATER USE PERMIT       )       PROPOSAL FOR DECISION  
78425-s76H BY MARIO LOCATELLI       )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 7, 1992, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Mario Locatelli for the above-entitled Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicant Mario Locatelli appeared at the hearing pro se.

Jack Mayo, a downstream appropriator of South Channel Roaring Lion Creek, appeared at the hearing as a witness for the Applicant.

Henry Grant, a downstream appropriator of South Channel Roaring Lion Creek, appeared at the hearing as a witness for the Applicant.

Objector Lee Llama Company appeared at the hearing by and through counsel, John D. Greef.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

CASE # 78425

FILMED

AUG 28 1992

Cindy G. Campbell, Hearings Unit Legal Secretary, appeared at the hearing.

#### EXHIBITS

The Applicant offered two exhibits to be entered into the record.

Applicant's Exhibit 1 is a copy of Certificate of Survey #3493 which is a retracement survey of portions of Lots 10, 11, and 12 and Lots 13 and 14, Teal Young Orchard Tracts located in the SE $\frac{1}{4}$  of Section 2, Township 5 North, Range 21 West, Ravalli County.<sup>1</sup> This exhibit was accepted into the record without objection.

Applicant's Exhibit 2 consists of seven pages which are written statements from long-time residents of the area concerning the water flowing in South Channel Roaring Lion Creek. This exhibit was accepted into the record with the understanding that Objector does not agree that South Channel Roaring Lion Creek referenced in those statements is the same source from which Applicant proposes to appropriate water.

The Department offered Department's Exhibits 1 and 2 for illustrative purposes and there were no objections to this purpose.

Department's Exhibit 1 is an enlargement copy of an aerial photograph showing Sections 2 and 11.

---

<sup>1</sup>Unless otherwise specified, all land descriptions in this Proposal for Decision are located in Township 5 North, Range 21 West, Ravalli County.

Department's Exhibit 2 is an enlargement copy of an aerial photograph showing Section 2.

Department's Exhibit 3 is an enlargement copy of an aerial photograph that has been enhanced to show the location of Applicant's property in red ink. There were no objections to the inclusion of this exhibit in the record.

The Department file was made available for review by all parties at the hearing. There were no objections to any part of the file; therefore the Department's file is entered into the record in its entirety.

#### PRELIMINARY MATTERS

During the hearing Applicant expressed a desire to use a pump as a means of diversion instead of the pipeline indicated in the public notice. As long as the pump would not pump more than 12 gallons per minute, the proposed flow rate in the Application, the change in the proposed means of diversion would not prejudice any objectors or potential objectors.

An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally

proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli. Since the change in means of diversion would not change the flow rate or volume of water proposed to be diverted, there is no need to republish the notice.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

#### FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Mario Locatelli duly filed Application for Beneficial Water Use Permit 78425-s76H with the Department on July 11, 1991. (Department file.)

3. Pertinent portions of the Application were published in the Ravalli Republic on December 11, 1991. Additionally the

Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. One timely objection to the Application was received by the Department. Applicant was notified of the objection by a letter from the Department dated January 9, 1992. (Department file.)

4. Applicant seeks to appropriate 12.00 gallons per minute (gpm) up to .48 acre-feet of the waters of South Channel Roaring Lion Creek<sup>1</sup> at a point in Lot 13 of Teal Young Orchard Tracts, more specifically in the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 2. The proposed use is for irrigation of 0.14 acre of lawn and garden located in Lot 13 of Teal Young Orchard Tracts in the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 2. The proposed means of diversion is a gravity flow two-inch pipeline and hose or a pump and hose. The proposed period of use is once a week from May 15 through July 15, inclusive of each year. (Testimony of Applicant and Department file.)

5. If the Applicant uses the gravity flow two-inch pipeline and hose, the pipe would be screened and the pipe opening completely submerged in South Channel Roaring Lion Creek and secured with a bar. Applicant would then apply suction to siphon the water into the pipe or fill the pipe with water by other means so it would then flow by gravity down to his lawn and garden approximately 300 feet down-gradient from the proposed

---

<sup>1</sup>Although the proposed source was advertised as an unnamed tributary of Roaring Lion Creek, the source was identified on a plat map dated 1909 as South Channel Roaring Lion Creek and is locally known as South Channel Roaring Lion Creek.



point of diversion. The difference in elevation from the point of diversion to the lawn and garden is approximately three feet. Applicant does not believe there will be sufficient pressure using this means of diversion to run a sprinkler system; therefore the method of irrigation would be flood. However, if Applicant installs a pump, water would be pumped to the place of use and could be used in a sprinkler for irrigation of the lawn and garden. Applicant did not specify how the pump would be installed; however a small pump that can be regulated to pump a maximum of 12 gpm placed on the bank of a water source with a screened intake hose or pipe placed in the water and a delivery pipe or hose from the pump to the place of use is a simple and customary method to divert and deliver small amounts of water such as Applicant proposes. Applicant requested assistance from USDA Soil Conservation Service (SCS) in designing his pump diversion, but was told SCS does not design such small systems. (Testimony of Applicant and recognized fact.)

6. The Applicant did not produce any water measurements during the hearing; however, there are pictures in the file showing more than 12 gpm flowing in South Channel Roaring Lion Creek and Applicant stated there is always sufficient water in the Creek until August when it may dry up until snow falls in the mountains and melts causing South Channel Roaring Lion Creek to begin flowing again. Mr. Mayo, who has lived at his current residence for 30 years and is the only downstream water user of South Channel Roaring Lion Creek before it empties into the

Bitterroot River, stated there is always sufficient water flowing in the creek. On the day of the hearing, the Hearing Examiner saw more than 12 gpm flowing in South Channel Roaring Lion Creek above Applicant's proposed point of diversion. During the hearing, Objector's counsel stated that Objector did not deny there is ample water available to meet Applicant's request provided the period of appropriation was limited to the time period stated in the Application. (Department file and testimony of Jack Mayo, John Greef, and Applicant.)

7. Applicant owns the proposed place of use, a lawn and a rather large vegetable garden in which he produces organically grown food for himself and his family. (Testimony of Applicant and Department file.)

8. There was contention by the Objector during the hearing that the Applicant's proposed source was not South Channel Roaring Lion Creek, but was in fact the Moore Ditch which is Objector's diversion and conveyance and that the map drawn by the person or persons who conducted the Water Resource Survey of Ravalli County in 1957 and 1958 was in error. (Testimony of John Greef and Michael McLane.)

9. Immediately following the hearing, Michael McLane, Cindy Campbell, and the Hearing Examiner made a site visit. We entered Objector's property on the south side of South Channel Roaring Lion Creek at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 2. We crossed a ditch and a fence common to the Applicant and Objector behind Applicant's home and walked in a west, southwesterly direction

locating the quarter section marker common to Section 2 and Section 11. The headgate for the Moore Ditch was then located at a point in the  $SE\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}$  of Section 11. We continued on to an old railroad bridge over Roaring Lion Creek. Objector has a new diversion immediately above the railroad bridge at a point in the  $SW\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}$  of Section 11 for its gravity flow irrigation pipeline. Ms. Campbell and the Hearing Examiner went back to the headgate of the Moore Ditch and walked down this ditch to a point in the eastern edge of the  $NE\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$  of Section 11, south of Applicant's property and buildings. The Moore Ditch had not entered Applicant's property or Section 2 up to that point. It proceeded in an east, northeasterly direction across the  $N\frac{1}{2}$  of Section 11. There is a cross ditch located near the corner of Applicant's pasture, south of his home, that allows the water from the Moore Ditch to be conducted into the Home Ditch then into the South Channel of Roaring Lion Creek. Mr. McLane walked down South Channel Roaring Lion Creek. He located the primitive diversion for the Home Ditch in the  $NE\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$  of Section 11 and followed this ditch to the Applicant's home. He then retraced his route to the Home Ditch diversion and followed the South Channel Roaring Lion Creek to an area due west of Applicant's home. The evidence found during the site visit indicates the field examiner's field mapping and aerial photograph interpretation of this area completed during the Water Resources Survey of Ravalli County is essentially correct and that the source from which Applicant proposes to appropriate is in fact South Channel

Roaring Lion Creek. To further reinforce this interpretation there is, in the Department file, a copy of a plat map completed in 1909 clearly showing South Channel Roaring Lion Creek flowing into Lot 13. Roaring Lion Creek has either been manipulated or has changed naturally to split into the North Channel Roaring Lion Creek and the South Channel Roaring Lion Creek further upstream than it did when the Water Resources Survey of Ravalli County was done. As a result, the Moore Ditch now diverts water from South Channel Roaring Lion Creek. (Department's Exhibit 1 and Department records.)

10. The Moore Ditch diverts water used by Objector from Roaring Lion Creek approximately one-half mile upstream from the Applicant's proposed point of diversion on South Channel Roaring Lion Creek. (Department file, Department's Exhibit 3, and testimony of Applicant and Michael McLane.)

11. The Lee Llama Company objected to this Application on the basis that Applicant has no point of diversion, that there is no stream entering Applicant's property, and that Objector believes the Applicant's proposed source is a part of a ditch system which originates on Objector's property. It is the Objector's position that Applicant has no right in that ditch system, thus has no legal means of diverting the water. Further, Mr. Greef stated that Applicant has no right in any manner, by prescription or otherwise, to enter Objector's property to divert water or improve the flow of water into any channel which enters Applicant's property. (Testimony of John Greef.)

12. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved that would be adversely affected by the proposed project. (Testimony of Applicant and Jack Mayo.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 2 and 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, irrigation of lawn and garden, is a beneficial use of water. See Mont. Code Ann. § 85-2-102(2) (1991); see also Finding of Fact 7. The amount requested for the proposed use is reasonable and there is nothing in the record to indicate water would be wasted.

5. Applicant has provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed and that during the period in which the Applicant seeks to appropriate water is reasonably available in the amount Applicant seeks to appropriate. See Findings of Fact 4 and 6.

6. The Applicant has provided substantial credible evidence the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 6, 9, and 10. Although Objector believes the proposed source is part of its ditch system and applicant has no right to divert from this source, the site visit

proved otherwise. See Findings of Fact 8, 9, and 11. If, however, the proposed source was a ditch system and the Applicant was able to satisfy the criteria for issuance of a permit, the Department would have no choice but to issue a permit. Ditch rights and water rights are not synonymous. See In re Application 43024-s43D by Reiter/Grunstead; In re Application 56738-s76M by Brookside Estates. A person may hold a water right but be unable to perfect that right because a ditch right or easement was not forthcoming. However, since that is not the case in this matter, the proposed source is a stream and the Objector's point of diversion is upstream from the Applicant's proposed point of diversion, the Objector cannot be adversely affected by the proposed project. See Findings of Fact 9 and 10.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5. The evidence provided is so minimal it is barely substantial or credible. However, since the amount of water Applicant seeks to appropriate is very small, 12 gpm up to .48 acre-foot, Applicant need not produce elaborate engineering designs for his means of diversion and conveyance method nor does he need to provide irrigation schedules. The Applicant proposed two different means of diversion, a gravity flow pipeline and hose and a small pump and hose. He provided more information about the gravity flow system than the pump system. The pump and conveyance system as described in Finding of Fact 5 is a



reasonable system for the amount of water Applicant proposes to divert, convey, and use, as is the gravity flow system.

The Department may condition a permit so Applicant is required to take certain actions to prevent an adverse effect to prior appropriators, to make his means of appropriation, construction, and operation adequate, or to take some action which will satisfy the 311 criteria. Mont. Code Ann. § 85-2-312(1) (1991). Therefore, in order to assure the means of diversion and conveyance Applicant chooses are adequate, Applicant is required to inform the Manager of the Missoula Water Resources Regional Office, of his choice of means of diversion and conveyance and supply any specifications requested before installation of said diversion means and conveyance.

8. Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 7.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 12.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

**PROPOSED ORDER**

Subject to the terms, conditions, restrictions, and limitations specified below, a Permit is hereby granted for



Application for Beneficial Water Use Permit 78425-s76H by Mario Locatelli to appropriate 12.00 gallons per minute up to .48 acre-feet of the waters of South Channel Roaring Lion Creek at a point in Lot 13 of Teal Young Orchard Tracts, more specifically, in the  $S\frac{1}{2}S\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$  of Section 2, Township 5 North, Range 21 West, Ravalli County, for irrigation of 0.14 acre of lawn and garden located in Lot 13 of Teal Young Orchard Tracts, in the  $S\frac{1}{2}S\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$  of said Section 2. The means of diversion shall be either a gravity flow two-inch pipeline and hose or a pump and hose. The period of use and diversion shall be from May 15 through July 15, inclusive of each year.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. In order to assure the means of diversion and conveyance Applicant chooses are adequate, Applicant shall inform the Manager of the Missoula Water Resources Regional Office, of his choice of diversion and supply any specifications requested before installation of said diversion means and conveyance.

3. Granting of this Permit does not grant the Permittee the right to manipulate the bank of South Channel Roaring Lion Creek in any way to accomplish perfection of this Permit.

4. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

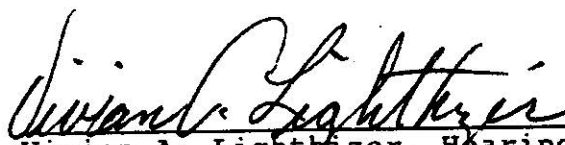
Transfer Certificate, Form 608, pursuant to Section 85-2-424,  
MCA.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and copies served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies of the responses must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 30<sup>th</sup> day of July, 1992.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties

of record at their address or addresses this 30<sup>th</sup> day of July,  
1992 as follows:

Mario Locatelli  
165 Mountain Goat Rd.  
Hamilton, MT 59840

The Lee Llama Co.  
77 Storm King Rd.  
Hamilton, MT 59840

Michael P. McLane, Manager  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(Via Email)

John D. Greef  
Attorney at Law  
P.O. Box 1434  
Hamilton, MT 59840

Cindy G. Campbell  
Cindy G. Campbell  
Hearings Unit Legal Secretary